No. 1227 80

In the Supreme Court of the United States

OCTOBER TERM, 1966 67

FEDERAL POWER COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY OF TEXAS,
A DIVISION OF CHEVRON OIL COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

RICHARD A. SOLOMON,
General Counsel,
Federal Power Commission,
Washington, D.C. 20426.

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FEDERAL POWER COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY OF TEXAS,
A DIVISION OF CHEVRON OIL COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in this case, entered on March 27, 1967.

OPINIONS BELOW

The court of appeals' *per curiam* opinion and orders here under review, formally setting aside the Commission's orders directing refunds, are not yet reported (App. A, *infra,* pp. 9–13). The court rendered two earlier opinions holding that the Commission had no power to require the refunds in question. One of these is reported at 370 F. 2d 181, and reprinted as App. A to the Commission's petition for a writ of certiorari in *Federal Power Commission* v.

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Sunray DX Oil Co., No. 1133, this Term. The other, *Pan American Petroleum Corp.* v. *Federal Power Commission*, C.A. 10, Nos. 7912 *et seq.*, is not yet reported. The pertinent portion of that opinion is printed in App. C, *infra*, pp. 22–28. The opinions and orders of the Federal Power Commission directing the refunds are not yet reported. They are printed in the Commission's petition in No. 1133 as App. C.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, pp. 14–21) were entered on March 27, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, provides in pertinent part as follows:

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested

persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *.

Section 7(e), 15 U.S.C. 717f(e):

* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

QUESTION PRESENTED

The Federal Power Commission, on the basis of applicants' allegations of emergency and without no-

tice or hearing, issued temporary certificates of public convenience and necessity permitting producers of natural gas to sell gas at specified prices pending hearing and determination by the Commission of their applications for permanent certificates. Subsequently, in the proceedings on the latter applications, the Commission determined the maximum initial price at which the gas could be sold consistently with the public convenience and necessity. This price was lower than those the producers had been charging under the temporary certificates. The question presented is whether the Commission is without power to require the producers to refund any of the excess collected during the interim period.[1]

STATEMENT

This case involves essentially the same sales of natural gas that are the subject of our petition for a writ of certiorari in No. 1133, this Term. As set forth in that petition, the Commission (by the orders there involved) granted permanent certificates for a number of sales which had previously commenced under temporary certificates. In most instances, the prices collected under the temporary certificates proved to

[1] In the event that certiorari is granted, we reserve the right to argue additionally that the Commission reasonably exercised its power in directing the refunds which it ordered in these proceedings. The question of the Commission's power and the propriety of its exercise of that power are of course closely related. Moreover, the latter question involves no complexities or factual disputes of a kind which would counsel preliminary examination by the lower court. Thus, this Court may consider it appropriate to dispose of the entire case even though the court of appeals decided only the question set forth in the text.

be higher than the permanent certificate price. The orders granting permanent authority reserved for future determination the question whether, as a further condition to the granting of the permanent certificates, the producers should be required to refund the charges collected under the temporary certificates insofar as those charges exceeded the amounts which would have been collected at the "in line" rate of 16 cents.

In the proceedings to which No. 1133 relates, the producers filed petitions for review challenging, *inter alia,* the Commission's power to order such refunds. The Commission urged dismissal of this challenge as premature. The court of appeals, noting that while the case had been pending before it the Commission had decided the reserved question (in the supplementary orders involved here), ruled that the Commission had no power to order any refunds, where, as here, the temporary certificates had not explicitly warned the producers that they might be ordered to make refunds should the in-line price prove to be lower than the prices charged during the period of temporary authorization.

The supplementary orders to which the court referred are those in issue here. They direct refunds of all amounts collected by the producers under their temporary certificates in excess of the in-line price of 16 cents, with the exception of (1) royalty payments made prior to February 1, 1964, attributable to the excess amounts collected and (2) State production payments for the same period attributable to the excess amounts collected, if they could not be recouped by

credit or otherwise (Pet. No. 1133, App. C). The producers also sought judicial review of these orders. Their petitions for review were consolidated in the Tenth Circuit, which, *per curiam,* on the basis of its earlier decision that the Commission had no power to order refunds in such circumstances, set aside the refund orders (App. A, *infra,* p. 12). The court did not reach the producers' further contention that, in any event, the ordering of refunds here was inequitable. The court stated (App. A, *infra,* pp. 11–12) that it would not consider that issue until and unless this Court determined that the Commission had the power to order refunds.

REASONS FOR GRANTING THE WRIT

In the judgment that we have asked this Court to review in our petition for certiorari in No. 1133, this Term, *Federal Power Commission* v. *Sunray DX Oil Co., et al.,* the Court of Appeals for the Tenth Circuit set aside a decision of the Commission granting certificates of public convenience and necessity, insofar as the Commission had reserved the question whether, as a condition of granting the certificates, it should require the applicants to refund certain excessive amounts received during a period of temporary authorization. In a subsequent decision, the same court

set aside the Commission's later orders resolving the reserved question and directing the producers to make refund. We believe that it would be appropriate for the Court to review this decision as well, and, if certiorari is granted, to consolidate the two cases for briefing and oral argument. Our reasons are as follows:

1. Should this Court grant certiorari in No. 1133 and reverse the court of appeals' judgment in that case, the court's later judgment setting aside the actual refund orders would remain technically undisturbed. Further proceedings in that court might therefore be required before the refunds could actually be made.

2. While we have concluded (see Pet. No. 1133, p. 7, n. 6) that the court of appeals, in its first decision, was not premature in reaching the question of the Commission's power to order refunds, a grant of certiorari to review the court's later decision would serve to obviate any possible question as to whether the issue is ripe for review.

3. Review of the second judgment of the court below would enable the Court—should it deem such a course appropriate—to terminate this litigation by ruling finally on whether the Commission properly ordered refunds in the circumstances of this case (see p. 4, n. 1, *supra*).

CONCLUSION

The petition for a writ of certiorari should be granted, and the case consolidated for briefing and oral argument with No. 1133.[2]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
Federal Power Commission.

APRIL 1967.

[2] Along with the companion petitions of the consumer interests, Nos. 1134 and 1135.

APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 9289, March Term, 1967

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; TEXACO INC.; SUNRAY DX OIL COMPANY; HUMBLE OIL & REFINING COMPANY; LAMAR HUNT; SOHIO PETROLEUM COMPANY; AND SUN OIL COMPANY, INTERVENORS

Filed March 27, 1967

On Petition to Review Orders of the Federal Power Commission

Before BREITENSTEIN, HILL, and SETH, Circuit Judges.

Per curiam

This petition seeks review of Federal Power Commission Opinions Nos. 501 and 501-A which require the petitioner and other independent producers, all of whom were parties to the consolidated proceedings styled Amerada Petroleum Corporation, et al., Docket Nos. C162 etc., to make refunds of amounts collected under unconditioned temporary certificates in excess of the price established in Opinion No. 422.

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Opinion No. 501 was entered while proceedings were pending before us for the review of Opinion No. 422. We disposed of the latter opinion and its accompanying orders in Nos. 7781 etc., *Sunray DX Oil Company, et al.* v. *Federal Power Commission,* 10 Cir., 370 F. 2d 181.

In that Sunray DX decision we pointed out that the threat of refund orders inherent in Opinion No. 422 had been followed by the action taken in Opinion No. 501; that the refund question was ripe for judicial determination; and that "proper judicial administration requires that it be deferred no longer." We held that, absent considerations not there present, refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition.

Our decision on the refund issue was reaffirmed in Nos. 7912 etc., *Pan American Petroleum Corporation, et al.,* v. *Federal Power Commission,* 10 Cir., —— F. 2d ——.

The petition for review now before us attacks Opinions Nos. 501 and 501–A on the grounds that the Commission lacked the power to order the refunds and that the power, if existing, was not properly exercised. The Commission, without waiving its opposition to our disposition of the refund issue, has moved for the severance of the issue of power from the issue of exercise of that power and for the summary disposition of the power issue. The petitioner has moved that the court "enter its Per Curiam Decision vacating and setting aside, on the basis of Opinion issued December 9, 1966, [the Sunray DX decision] * * * , Respondent's Opinion Nos. 501 and 501–A and related Orders." The Commission filed a response to the petitioner's motion and, although reas-

serting its position on the merits, said that "it agrees to the proposed procedure for decision."

Petitions for certiorari to review our Sunray DX decision are now pending in the United States Supreme Court. See 35 LW 3323.

We have before us 10 other petitions to review Opinions Nos. 501 and 501-A. They are:

No. 9227—Sunray DX Oil Company
No. 9287—Patchin-Wilmoth Industries, Inc.
No. 9308—Sohio Petroleum Company
No. 9310—Texaco, Inc.
No. 9311—Sun Oil Company
No. 9315—Edwin L. Cox
No. 9316—Humble Oil & Refining Company
No. 9317—Lamar Hunt
No. 9318—George H. Coates
No. 9319—Clark Fuel Producing Company

By petitions in intervention heretofore granted, Texaco, Sunray DX, Humble, Hunt, Sohio, and Sun oppose both the motion of the Commission for a severance and the motion of Standard Oil Company of Texas for summary disposition. These intervenors assert that the grant of such motions would result in the improper fragmentation of appeals and would have the effect of depriving them of the right to be heard on the individual inequities arising from the manner in which the Commission has ordered refunds.

We are committed to the principle that the Commission has no power to order refunds when the temporary certificate contains no express refund provisions. Because we believe that the Commission lacks such power, we are not concerned with the exercise of the power. No good purpose would be served by granting the severance which the Commission proposes. The exercise of the power depends on the existence of the power. With commendable frank-

ness the Commission says that we are wrong in the Sunray DX decision on refunds and that it expects the error to be rectified in the certiorari proceedings which it has brought. When and if this occurs, the time will have arrived for us to consider the individual equities.

In the ten other petitions for review of Opinions Nos. 501 and 501–A we have no motion for summary disposition like that presented here by Standard Oil Company of Texas. All petitions should receive the same treatment. Accordingly, on our own motion, we are today deciding all ten of them on the basis of this decision.

The motion of the respondent for severance is denied. The motion of the petitioner for summary disposition is granted. On the authority of *Sunray DX Oil Company* v. *Federal Power Commission,* 10 Cir., 370 F. 2d 181, and *Pan American Petroleum Corporation* v. *Federal Power Commission,* 10 Cir., —— F. 2d ——, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9227

Per curiam

The motion of the petitioner to hold in abeyance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

Nos. 9308 AND 9318

Per curiam

The motion of the respondent for severance is denied. The motion of the petitioner to hold in abeyance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission*, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

Nos. 9287, 9310, 9311, 9315, 9316, 9317 AND 9319

Per curiam

The motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission*, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

APPENDIX B

United States Court of Appeals, Tenth Circuit

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; TEXACO INC.; SUNRAY DX OIL COMPANY; HUMBLE OIL & REFINING COMPANY; LAMAR HUNT; SOHIO PETROLEUM COMPANY; AND SUN OIL COMPANY, AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

Filed March 27, 1967

On Petitions To Review Orders of the Federal Power Commission

No. 9289, March Term, 1967

Before Honorable JEAN S. BREITENSTEIN, Honorable DELMAS C. HILL, and Honorable OLIVER SETH, Circuit Judges.

This cause came on to be heard on petition to review orders of the Federal Power Commission, motion of respondent for severance and motion of petitioner for summary disposition and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for severance is denied. The motion of the petitioner for summary disposition is granted. On the authority of *Sunray DX Oil Company* v. *Federal Power Commission,* 10 Cir., 370 F.2d 181, and *Pan American Petroleum Corporation* v. *Federal Power Commission,* 10 Cir., —— F.2d ——, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9227

SUNRAY DX OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

UNITED GAS IMPROVEMENT COMPANY; SUN OIL COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of petitioner to hold in abeyance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the petitioner to hold in abeyance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9308

SOHIO PETROLEUM COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission, motion of respondent for severance and motion of petitioner to hold in abeyance, and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for severance is denied. The motion of the petitioner to hold in abeyance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9318

GEORGE H. COATES, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission, mo-

tion of respondent for severance and motion of petitioner to hold in abeyance, and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for severance is denied. The motion of the petitioner to hold in abeyance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission*, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9287

PATCHIN-WILMOTH INDUSTRIES, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission*, Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9310

TEXACO, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9311

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and

motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9315

EDWIN L. COX, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9316

HUMBLE OIL & REFINING COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9317

LAMAR HUNT, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

No. 9319

CLARK FUEL PRODUCING COMPANY (OPERATOR) ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE BROOKLYN UNION GAS COMPANY; AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

This cause came on to be heard on petition to review orders of the Federal Power Commission and motion of the respondent for severance and was submitted to the court.

On consideration whereof, it is ordered by this court that the motion of the respondent for a severance is denied. On the court's own motion and on the authority of its decision in No. 9289, *Standard Oil Company of Texas* v. *Federal Power Commission,* Opinions Nos. 501 and 501–A of the Federal Power Commission, and accompanying orders, are set aside and held for naught.

APPENDIX C

United States Court of Appeals, Tenth Circuit

Nos. 7912, 7962, 8115, 8116, 8118, 8119, 8121, 8122, 8123, 8124, 8125, January Term, 1967

March 9, 1967

PAN AMERICAN PETROLEUM CORPORATION; E. COCKRELL, JR.; CONTINENTAL OIL COMPANY; FREEPORT SULPHUR COMPANY; GENERAL AMERICAN OIL COMPANY OF TEXAS; J. RAY MCDERMOTT & CO., INC.; PLACID OIL COMPANY, ET AL.; SHELL OIL COMPANY; THE SUPERIOR OIL COMPANY; AND U.S. OIL OF LOUISIANA INC., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

LONG ISLAND LIGHTING COMPANY; PHILADELPHIA ELECTRIC COMPANY; PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, INTERVENORS

On Petitions To Review Orders of the Federal Power Commission

Before LEWIS, BREITENSTEIN, and HILL, Circuit Judges.

LEWIS, Circuit Judge.

These petitions by independent natural gas producers seek review under section 19(b) of the Natural

Gas Act[1] of orders entered by the Federal Power Commision establishing an "in-line" price and other conditions for permanent certificates of public convenience and necessity issued under section 7 of the Act and covering sales of gas in interstate commerce from producing areas in South Louisiana and the adjacent federal domain offshore.[2] Proceedings before the Commission encompassed some 362 separate certificate applications, two-thirds of which were settled and severed before the conclusion of hearings, for a wide variety of gas-sales contracts executed between 1945 and 1963.[3] By its orders the Commission set the "in-line" price, or maximum initial price, at 18.5 cents per Mcf, with an additional 1.5 cents per Mcf for tax reimbursement where the gas is produced within the taxing jurisdiction of Louisiana. Refunds were required, with interest, for amounts in excess of the in-line price previously collected under temporary certificates that contained express provisions for potential refund liability. All permanent certificates that issued were made subject to a moratorium on increased-rate filings above 23.55 cents per Mcf, including tax reimbursement, pending completion of the South Louisiana area rate proceeding or July 1, 1967, whichever is earlier. Finally, for those producers whose temporary certificates contained no refund conditions, the Commission reserved for further consideration the question of whether they would in fact be required to make refunds.

The petitions are before this court by virtue of the fact that Pan American Petroleum Corporation, pe-

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[1] 15 U.S.C. § 717r(b).

[2] *Union Texas Petroleum et al.*, Opinions Nos. 436 and 436-A, reported at 32 F.P.C. 254 and 32 F.P.C. 952.

[3] The petitions for review by four producers have been separately considered in this court. See *Continental Oil Co. v. FPC* —— F. 2d, Feb. 10, 1967.

titioner in Nos. 7912 and 7962, has its principal place of business within the territorial bounds of this circuit and was the first producer to file for review. The other petitioners are transfers from other circuits. 28 U.S.C. § 2112(a). The four intervenors are parties of record, but upon their election not to file briefs we denied their requests to present oral arguments.

At the hearings below, several producers offered economic and geological evidence which purported to reflect an increase in production costs from those that had prevailed during prior South Louisiana certificate proceedings. The examiner rejected this evidence, the Commission sustained the examiner, and some of the petitioners here have filed motions to adduce. Action on the motions was deferred until completion of arguments on the merits of the orders. We have since held in *Sunray DX Oil Co.* v. *FPC*, —— F. 2d ——, Dec. 9, 1966,[4] that the standards of public convenience and necessity to be applied by the Commission in section 7 proceedings do not compel admission of such evidence. And while circumstances surrounding certificate applications may on occasion dictate consideration of cost factors, these are matters subject in the first instance to Commission expertise and discretion. *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 227. Here, as will be discussed, the Commission's orders are based partially upon comparisons between current prices and in-line prices previously established. Concededly, current economic and geological cost evidence could have a substantial effect upon final disposition of the applications. But for purposes of section 7, there is noth-

[4] References hereinafter to *Sunray DX* will be to the Dec. 9, 1966 decision of this court, —— F. 2d ——, unless otherwise noted.

ing in the record to suggest an abuse of Commission discretion in the rejection of such evidence, and accordingly, the motions to adduce will be denied. We turn then to the substantive content of the orders and the producers' various objections thereto.

* * * * *

REFUNDS UNDER UNCONDITIONED TEMPORARY CERTIFICATES

As in our *Sunray DX* case, petitioners vigorously object to the portion of the Commission's orders that defers for further consideration the questions of whether and to what extend refunds will be required where temporary certificates were issued without express refund conditions. And while, unlike *Sunray DX*, we are not aware of any recent Commission action directing petitioners with unconditioned temporary certificates to make refunds out of the subject sales, we are nevertheless convinced that there is sufficient aggrievement for review at this time. On the authority of the *Skelly* case, *Public Service Comm'n of New York* v. *FPC, D.C. Cir.*, 329 F. 2d 242, *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963, the Commission has ruled that it has "both the power and the duty to require refunds of amounts collected in excess of the 'in-line' price" even where temporary authorizations are silent as to potential refund liability. *Skelly Oil Co., et al.*, Opinion No. 492, June 1, 1966.[13] Many producers, in reliance upon prior assurances that all of the moneys collected

[13] See also *Sun Oil Co., et al.*, Opinion No. 502, July 28, 1966; *Amerada Petroleum Corp., et al.*, Opinion No. 501, July 27, 1966; *Turnbull & Zoch Drilling Co., et al.*, Opinion No. 499, July 25, 1966; *H. L. Hawkins, et al.*, Opinion No. 498, July 22, 1966.

under such authorizations was theirs to keep,[14] have spent or reinvested the proceeds from their sales and would be hard put to find now the substantial amounts necessary for refunds. Inasmuch as the Commission's position on the merits of the issue is firmly established, albeit in opinions not related to this case, the threat of loss to these petitioners is real and imminent, and judicial consideration of their liability need not be postponed. *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407, 417–21; *Sunray DX Oil Co.* v. *FPC,* 10 Cir., 351 F. 2d 395, 400; *Hinton* v. *Udall,* D.C. Cir., 364 F. 2d 676, 680.

We held in *Sunray DX* that "refunds may be ordered under § 7 only when a producer contractually undertakes to make such refund by the acceptance of a temporary certificate containing an express refund condition."[15] We adhere to that decision for purposes of this case and see no reasons for duplication here of principles and views already discussed. We shall, however, consider one con-

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[14] See FPC Chairman Swidler's published address to the 1961 annual meeting of the American Petroleum Institute. See also 29 F.P.C. 223, 225, where in denying intervenors' motions to impose refund conditions on previously issued unconditioned temporary certificates, a unanimous Commission stated:

> "[W]e would be in a position of having induced producers' to dedicated their gas to the market upon one set of conditions, and then imposing course of action, except under the most extraordinary conditions, would appear to be inconsistent with the Commission's obligation to act upon applications with 'such certainty as to allow the exercise of choice upon (the producer's) part'. *Sunray Mid-Continent Oil Company* v. *F.P.C.*, 270 F. 2d 404. Equally important it would so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy."

[15] ——— F. 2d at ———. The rule would not apply of course where an unconditioned temporary certificate has not become final and is overturned by a reviewing court. *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229.

tention that has been made by the Commission and not covered in the *Sunray DX* opinion. It is that every producer selling gas under an unconditioned temporary certificate should be charged with notice that refunds might be ordered as of the date of the District of Columbia Circuit's *Skelly* decision. From then on, says the Commission, "a producer should have taken steps to protect himself in the event refunds were ordered, and if he failed to do so, he has no equity to plead which will affect his refund obligation."[16] Aside from the fact that the *Skelly* decision could directly affect only the parties involved, we think that at that time producers generally still had every reason to believe that such refunds would not be ordered. The decision said that the Commission has the power to order refunds even though temporary certificates do not warn of this contingency, that exercise of this power is not necessarily mandatory, but that when the power is not exercised the record must show the equitable considerations involved. When petition for certiorari was filed by producers a very short time after the decision, the Commission filed a brief in opposition stating that "it is entirely possible * * * that the Commission, after reviewing all pertinent factors, will again reach the conclusion that refunds are inappropriate." It is difficult to imagine how a case in this posture could have dictated immediate preparation for a turning away from years of Commission assurances[17] and from what was believed to be settled judicial interpretation.[18]

Both the Commission and the courts have repeatedly

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[16] *H. L. Hawkins, et al.*, Opinion No. 498, p. 3, July 22, 1966.

[17] See note 14 *supra.*

[18] *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 270 F. 2d 404, 408–10; *cf. PFC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618.

acknowledged that stability of prices is one of the great objectives of regulation under the Natural Gas Act. We have been especially mindful of this objective in our consideration of the moratoria on new rate filings and other restrictive conditions in the producers' licenses to sell gas in interstate commerce. It is manifest, however, that price stability is undermined by threats or attempts to fix prices retroactively without prior warning or, even worse, with prior assurances that specifically negate the refund contingency. Such action not only violates fundamental notions of due process, it also defeats a fundamental purpose for which the regulation was created. The Commission has stated that "temporary authorizations are not and could never be a vehicle for assuring such [price] stability by the very method by which they are handled." *Skelly Oil Co., et al.*, Opinion 492, p. 4, June 1, 1966. We emphatically disagree. The very fact that many temporary authorizations now contain refund conditions attests to their role in holding the line against changing prices. And whatever the method by which temporary authorizations are handled, we consider it unconscionable to impose upon an unwary producer a hidden liability which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce. The principle of imposing and enforcing a retroactive condition where none exists, if carried to the extreme, could expand to render a fully established section 5 just and reasonable rate totally unstable and always subject to the lurking possibility of refund. The harm is only more apparent in the latter case.

The motions to adduce additional evidence are denied. All cases are remanded to the Commission for further proceedings consistent with this opinion.

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